

Standard of Plausibility in Provisional Measures Prescribed by the International Tribunal for the Law of the Sea

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ABSTRACT

The work will analyze the requirement of plausibility in provisional measures prescribed by International Tribunal for the Law of the Sea (ITLOS) and comparing the application of this requirement by other International Courts and Tribunals. For this purpose, the project will be divided in three parts. First, the author verifies the scope of provisional measures issued based on how United Nations Convention on the law of the Sea (UNCLOS) defines its concept, aim, and the requirements necessary to be prescribed by the Tribunal. Second, the article will be digging deeper into the plausibility requirement by showing what this requirement means by analysing its evolution, object, and standard. Third, this paper will address the central theme proposed by the author, which is the standard of application of the plausibility by ITLOS and if it fits the same application by other Courts and Tribunals, such as UNCLOS Annex VII's Arbitral Tribunals and International Court of Justice (ICJ). In its preliminary conclusion, the current research shows that ITLOS does not clarify a standard of application of the requirement that fits the same standard of other Courts and Tribunals, leading to further questions.

Key words : United Nations Convention on the law of the Sea (UNCLOS), International Tribunal for the Law of the Sea (ITLOS), provisional measures, plausibility, standard of application

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1. Introduction

In the context of provisional measures prescribed by the International Tribunal for the Law of the Sea (ITLOS), the requirement of plausibility has been gaining strong evidence. The plausibility of certain rights inherent to the process is necessary for prescribing provisional measures, and the parties must not only demonstrate the right but its success on the merits.

However, the lack of a definitive standard of the requirement makes its application a reason for debates in doctrine and jurisprudence. In this sense, this research aims to analyze the application pattern of plausibility requirement in ITLOS. To achieve this purpose, the work will be divided into three parts.

First, it will verify how International Courts and Tribunals generally apply provisional measures. By verifying its requirements, concept and purpose, a broad observation will be allowed before delving into the central theme of this work.

Next, the plausibility requirement will be presented. The author will seek to present the main characteristics of the requirement in order to present its purpose in the issue of provisional measures by the Courts and Tribunals. In addition, the author will seek to verify the debate about the lack of standards for applying the requirement. In the next section, the analysis of the application of the standard by ITLOS is presented.

Finally, the author seeks to verify the standard of application of plausibility in ITLOS. Through the analysis of jurisprudence, the work will seek how the Tribunal applies plausibility and verify if there is a possible differentiation between the forms of application of the requirement between the prescribed measures based on Article 290(1) and on Article 290(5) of the United Nations Convention on the Law of the Sea (UNCLOS).

In its conclusion, the work demonstrates that although the standard of application of the plausibility requirement in ITLOS follows what was initially presented by the International Court of Justice (ICJ), however, some procedural aspects need to change application of the requirement in some cases at the Tribunal. In other words, depending on the modality of provisional measures applied, plausibility must meet different forms of application for the cases under Article 290(1) or Article 290(5).

2. Provisional Measures Prescribed under UNCLOS

Provisional measures are incidental proceedings with the primary purpose to protect the right of the parties against damage to their respective rights. To fulfil

its purpose, its measures can modify situations occurring or take actions to guarantee the protection of the parties' rights. In other words, provisional measures protect the object of the litigation during the process. Additionally, these measures are essential instruments to prevent damage to the rights or the extension of the dispute or protect the environment, either on the parties' initiative or on their initiative at ITLOS (Karaman, 2012, pp. 138-141; Palchetti, 2008, p. 624).

Some characteristics are relevant to measures in general, such as the two possible forms of measures issued by ITLOS, measures prescribed in accordance with Article 290(1) and 290(5). UNCLOS Article 290(1) measures are no more than incidental procedures incorporated into a main extensive process. Additionally, UNCLOS gives the possibility in its article 290(5) of instituting an autonomous process pending the constitution of an arbitral tribunal based on Annex VII from UNCLOS. In that sense, Article 290(5) allows the parties to request provisional measures to ITLOS pending the constitution of the Annex VII Arbitral Tribunal, consequently working as an independent process (Brown, 2007, p. 120).

In this sense, another characteristic that differentiates such measures is present in the possibility of re-analyzing them in one its requirements for their prescription, the *prima facie* jurisdiction. In the provisional measures prescribed in terms of Article 290(1), it is only necessary to verify the jurisdiction of ITLOS for the indication of such measures as repeatedly happens in cases of incidental proceedings. However, in the provisions of Article 290(5), in addition to demonstrating the jurisdiction of ITLOS, the claimant must state the legal bases of the Arbitral Tribunal's jurisdiction, which may subsequently be confirmed, revoked or changed. Such verification is called "Residual Jurisdiction" by Mensah (2002, pp. 43-50). Depending on the Tribunal, the measures will have a greater or lesser provisional nature.

The Tribunals' discretion based on UNCLOS in prescribe provisional measures is reduced concerning other bodies such as ICJ. This is because, according to UNCLOS' Article 290(3), the measures can only be prescribed, revoked or modified if requested by the parties (Marr, 2000, p. 819). It can be briefly summarized in the observance by ITLOS in prescribe measures in cases where the evidence shows a real need to protect the right until the final decision by ITLOS.¹

For its prescription, some requirements essentially developed within the scope of decisions of International Courts and Tribunals must be met, which are: (a) *prima facie* jurisdiction, (b) connection between the measures and the right

¹ However, according to Barboza, there is a danger to the protection of rights *pending lite* if the provisional measures become too exceptional by highlighting that: "Their being exceptional means no more than that they are based on different principles and have a different nature than other judicial decisions, for instance, that they are not *res judicata* and therefore may be reversed at any moment *pendente lite*. It is true that special caution should be employed to avoid anticipation of the final judgment through a provisional measure, but it should also be borne in mind that abstaining from indicating one may have at times the same anticipatory though opposite effect (Barboza, 2007, p. 144).

alleged in the case, (c) danger of irreparable harm, (d) urgency, and (e) plausibility (Tanaka, 2019, pp. 519-526).

The *prima facie* jurisdiction is the requirement that is basic in the consent of the parties and precondition for the existence of the cases themselves (ICJ, 1954, pp. 19-32; 1959, pp. 48-51; 1978, pp. 3-45; 1995, pp. 77-80; 1998, pp. 432-469; 2011d, pp. 537-542.).² UNCLOS expresses that: "A court or Tribunal referred to in article 288 shall have jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part."³ Additionally, the Court or Tribunal must be facing a dispute between the parties, its subject has to be a disagreement on the application or interpretation of UNCLOS and, the conflict must still occur at the date that was submitted to the Court or Tribunal.⁴

UNCLOS Article 290 has two types of jurisdiction that ITLOS can utilize to prescribe its measures depending on the situation: jurisdiction over disputes regarding the application or interpretation of UNCLOS in cases presented to the Tribunal and over disputes about the prescription of provisional measures pending the creation of the Annex VII Arbitration Tribunal, corresponding to paragraphs 1 and 5 of article 290 respectively (Miles, 2016, pp. 156-158). In article 290(1), the Tribunal determines its jurisdiction by analyzing the legal grounds on which the case will be constituted. In *M/V Saiga* (No. 2), the Tribunal expressed that it would not need to restate its analysis of jurisdiction about the case and could not apply the measures unless the provisions presented by its applicant appeared to be *prima facie*, to provide the basis of ITLOS's jurisdiction for the application of the procedure.⁵ In another way, the measures of article 290(5) have particularities for determining their *prima facie* jurisdiction, since ITLOS considers provisional measures pending the creation of the Annex VII Arbitral Tribunal, the claimant must indicate the legal grounds on which the arbitral Tribunal will have jurisdiction (Karaman, 2006, pp. 120-131; Mensah, 2005, pp. 61-69; Vicuña, 2007, pp. 459-

2 ICJ. *Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America)*, Preliminary objections, 1954, pp. 19-32; ICJ. *East Timor (Portugal v Australia)*, Summary 1995/2, 1995, pp. 77-80; ICJ. *Fisheries Jurisdiction (Spain v. Canada)*, Questions of jurisdiction and/or admissibility, Judgment of 4 December 1998, 1998, pp. 432-469; ICJ. *Interhandel (Switzerland v. United States of America)*, Separate Opinion of Judge Wellington Koo, 1959, pp. 48-51; ICJ. 1978. *Aegean Sea Continental Shelf (Greece v. Turkey)*, Questions of jurisdiction and/or admissibility, Judgment of 19 December 1978, 1978, pp. 3-45; ICJ. *Request for Interpretation of the Judgment of 15 June 1962 in the Case Concerning the Temple of Preah Vihear (Cambodia v Thailand)*, *Provisional Measures*, Order of 18 July 2011, 2011d, pp. 537-542.

3 Art. 287, UNCLOS.

4 ITLOS. "*Enrica Lexie*" (*Italy v. India*), *Provisional Measures*, Dissenting Opinion of the Judge Ndiaye, 2015 b, p. 185; para. 14.

5 ITLOS. *M/V "SAIGA"* (No. 2) (*Saint Vincent and the Grenadines v. Guinea*), Separate Opinion of Judge Laing, 1999a, p. 191; para. 56; In that same sense see PCA. *The MOX Plant Case (Ireland v. United Kingdom)*, Arbitration Tribunal Constituted Pursuant to Article 287, and Article 1 of Annex VII, of the United Nations Convention on the Law of the Sea for the Dispute Concerning the MOX Plant, International Movements of Radioactive Materials, and Protection of the Marine Environment of the Irish Sea, Order N° 4. 2003, pp. 2-3; ITLOS. *MOX Plant (Ireland v. United Kingdom)*, *Provisional Measures*, Order of 3 December 2001, 2001b, p. 110, para. 84; *Ibid.*, p. 97, para. 14.

461). In this sense, a double analysis of jurisdiction can be understood as a benefit, removing the doubt about its existence in the cases of Article 290(5).⁶

As for the nexus between the measures and the rights requested by the parties, the main objective of the provisional measures is to preserve the parties' rights to the dispute, so there must be a correspondence between the main object of the dispute with the provisional measures' requests. In other words, the requested measures must demonstrate a nexus with a right explained in the request (Lee-Iwamoto, 2012, pp. 241-247; Oelers-Frahm, 2012).

Article 290 of UNCLOS does not expressly address this requirement. However, while ICJ jurisprudence has developed it significantly over the years, comparatively, the provisional measures prescribed by the Tribunals constituted based on UNCLOS took more time to evidence the requirement.⁷ ITLOS, for example, used the expression "the Court or tribunal may prescribe any provisional measures which it considers appropriate under the circumstances to preserve the respective rights of the parties to the dispute" (KLEIN, 2005, pp. 52-53).⁸ It was only in *Dispute Concerning Delimitation of the Maritime Boundary Between Ghana and Côte d'Ivoire* that ITLOS Special Chamber explicitly introduced the requirement by referring to the same ICJ terminology.⁹

In this sense, although not constantly referring to it,¹⁰ the analysis of the connecting element between the request and the provisional measures requested by the parties in ITLOS reinforces the conclusion that the consolidation of the provisional measure's requirement will be a construction that will be prolonged and evolve as cases develop.

The requirement of irreparable harm to the rights concerns the impact on a specific situation protected by a right (Bendel, 2019, p. 507). The first mentions to the requirement took place in the Permanent Court of International Justice, as in the case *Denunciation of the Treaty of 2 November 1865 between China and Belgium*.¹¹ Over the years, the requirement was present in ICJ decisions, until it

6 ITLOS. *Southern Bluefin Tuna (Australia v Japan; New Zealand v Japan)*, Separate Opinion of Judge ad hoc Shearer, 1999b, pp. 320-329.

7 ICJ. *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Request for the Indication of Provisional Measures, 2016, p. 1166; para. 72; Contudo, apesar da relevância desses casos, é importante enfatizar que o requisito apareceu inicialmente no caso *Arbitral Award of 31 July 1989 (Guinea-Bissau v Senegal)*, que tratou da determinação de áreas marítimas entre Guiné-Bissau e Senegal. ICJ. *Arbitral Award of 31 July 1989 (Guinea-Bissau v Senegal)*, Provisional Measures, Order 2 March 1990, 1990, pp. 69-70; para. 25; ICJ. *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Provisional Measures, Order of 13 July 2006, 2006a, pp. 113-135; Miles, *supra note 12*, at 184.

8 Art. 290, UNCLOS. (emphasis added); ITLOS. *MOX Plant (Ireland v. United Kingdom)*, Provisional Measures, Order of 3 December 2001, 2001b, p. 110; para. 81; ITLOS. *ARA Libertad (Argentina v Ghana)*. Provisional Measures, of 15 December 2012, 2001a, p. 349; para. 100.

9 ITLOS. *Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana v; Côte d'Ivoire)*, Provisional Measures, Order 25 April 2015, 2015c, p. 159; para. 63.

10 In that sense, even though the *Enrica Lexie* incident did not make any mention of the requirement, it can be seen that it is still a requirement under construction. ITLOS. *The Enrica Lexie Incident (Italy v. India)*, Provisional Measures, Order of 24 August 2015, 2015a, pp. 183-205; para. 1-141.

11 The Court states that: "Whereas, this being so, the object of the measures of interim protection to be indicated in the present case must be to prevent any rights of this nature from being prejudiced." ICJ.

became expressly mandatory in the *Nuclear Tests* cases.¹²

As in ICJ, the requirement was added from the decisions of UNCLOS Tribunals (Laing, 1998, pp. 64-65). However, as Mensah demonstrates, in the early cases of provisional measures in ITLOS (Mensah, 2002, pp. 47-48), the Tribunal was reluctant to link irreparability to the irreparable harm requirement, only appearing in the judges' individual opinions to the cases.¹³ This trend was reversed only in the Annex VII Arbitral Tribunals judgment of the *MOX Plant* case. The Tribunal refrain what had been elaborated in ITLOS and resorted to ICJ requirement standard.¹⁴ In this sense, despite the initial reluctance, irreparable damage in UNCLOS Tribunals is currently considered a requirement for the prescription of provisional measures, as the most recent decisions demonstrate.¹⁵

Although not expressly present, both in Article 41 of ICJ Statute, as in Article 290(1) of UNCLOS (Laing, 1998, p. 55), urgency is an inherent requirement of provisional measures (Karaman, 2012, p. 141). Nevertheless, ITLOS and the Arbitral Tribunals established under Annex VII showed equal concern about the requirement. Both adopted an urgency model similar to that applied by ICJ (Miles, 2016, p. 243).

In the cases established under the terms of Article 290(5), the requirement of urgency was widely discussed. The requirement expressly mentioned in the paragraph by stating that: "if it considers that prima facie the tribunal which is to be constituted would have jurisdiction and that the urgency of the situation so requires (...)." ¹⁶ The question of urgency under Article 290(5) must be manifested within the limits of the Tribunal's ability to conduct the case and it must institute

Denunciation of Treaty of November 2nd, 1865, between China and Belgium (Belg. v. China), 1927 P.C.I.J. (ser. A) No. 8 (Order of 8 January 1927) Publications of the Permanent Court of International Justice Series A – No. 8; Collection of Judgments. A.W. Sijthoff's Publishing Company, Leyden, 1927, para. 11.

12 ICJ. *Nuclear Tests (Australia v. France)*, Interim Protection, Order of 22 June 1973, pp. 113-110; para. 20-30; ICJ. *Nuclear Tests (New Zealand v. France)*, Provisional Measures, Order of 22 June 1973, 1973, pp. 139-141; para. 20-30; ICJ. *Fisheries Jurisdiction (Germany v. Iceland)*, Provisional Measures, Order of 17 august 1972, 1972a, p. 34; para. 22-23; ICJ. *Fisheries Jurisdiction (United Kingdom v. Iceland)*, Provisional Measures, Order of 17 august 1972, 1972b, p. 16; para. 20-21.

13 ITLOS. *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, Separate Opinion of Judge Laing, 1999a, p. 187; para. 50; ITLOS. *Southern Bluefin Tuna (Australia v. Japan; New Zealand v. Japan)*, Provisional Measures, Separate Opinion of Judge Treves, 1999c, p. 317; para. 5; ITLOS. *ARA Libertad (Argentina v. Ghana)*, Provisional Measures, Separate Opinion Judge Paik, 2012, pp. 253-254; para. 5-6.

14 ITLOS. *MOX Plant (Ireland v. United Kingdom)*, Provisional Measures, Order of 3 December 2001, 200 a, p. 109; para. 73.

15 ITLOS. *Land Reclamation in and around the Straits of Johor (Malaysia v. Singapore)*, Provisional Measures, Order of 8 October 2003, 2003, pp. 27-28; para. 106(1)(c); ITLOS. *M/V Louisa Case (Saint Vincent Grenadines v. Spain)*, Provisional Measures, Order of 23 December 2010, 2010, p. 69, para. 72; ITLOS. *Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana v. Côte d'Ivoire)*, Provisional Measures, 2015, Order 25 April 2015, 2015c, pp. 161-164; para. 74-96; ITLOS. *The Enrica Lexie Incident (Italy v. India)*, Provisional Measures, Order of 24 August 2015, 2015a, p. 197; para. 87; ITLOS. *Concerning the Detention of Three Ukrainian Naval Vessels (Ukraine v. Russian Federation)*, request for Provisional Measures, Order 25 May 2019, 2019a, pp. 25-28; para. 100-113; ITLOS. *The M/T San Padre Pio Case (Switzerland v. Nigeria)*, Request for the Prescription of Provisional Measures, Order of 6 July 2019, 2019b, pp. 27-32; para. 111-131.

16 Art. 290(5), UNCLOS. (emphasis added).

its measures in a shorter period than the usual one for prescribe necessary measures pending the constitution of the Annex VII court (Miles, 2016, p. 246).

On the other hand, according to the understanding of some authors related to the temporal perspective (Tanaka, 2019, pp. 524-525), both the cases of provisional measures according to Article 290(1) as in the cases judged under Article 290(5) urgency is present until the final decision. From the temporal perspective, two classifications emerge. The first just put urgency as a synonym of imminent danger. The second place the requirement as an ongoing fact. This is evident when cases involve damage to the marine environment due to ongoing damage committed by one of the parties.¹⁷

About the last requirement, this article will delve into the requirement of plausibility in the next chapter.

3. Requirement of Plausibility

Plausibility can be understood as a test to establish that the rights asserted by applicant states might exist on the merits of the case (Lando, 2018, p. 641; Miles, 2018, p. 193). Such right must be plausible concerning the provisional measures requested (Marotti, 2014, p. 761).

In developing the requirement, the International Courts and Tribunals have developed a consolidated understanding on how to establish the requirement (Sparks and Somos, 2021, p. 81). In the analysis of provisional measures, the Courts and Tribunals must follow the procedures necessary to fulfil the requirements for the prescription of measures. First, the existence of *prima facie* jurisdiction is analyzed, and, if satisfied, it can analyze the other requirements in order to prescribe the measures. After its verification, the analysis of the other requirements already mentioned begins due the nexus between the measures and the rights requested by the parties, irreparable harm, urgency, and the focus of this article, Plausibility (Miles, 2018, pp. 1-2).

Despite its importance, plausibility has some imprecision in its standard. International Courts and Tribunals need to consider the probability of the claimant's right to have a chance of succeeding on the merits. Consequently, this requirement leads to multiple possible interpretations as it is up to the discretion of judges how necessary the rights must be to achieve success (Le Floch, 2021, p. 28). Such subjectivity can lead to some problems with the appearance of preliminary consideration of merits (Miles, 2016, p. 194). On the other hand, it prevents parties from submitting provisional measures with frivolous and baseless requests

¹⁷ ITLOS. *Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan)*, Provisional Measures, Dissenting Opinion of Judge Vukas, 1999d. pp. 330-335; para. 1-6; ITLOS. *MOX Plant (Ireland v. United Kingdom)*, Provisional Measures, Order of 3 December 2001, 2001b, pp. 95-110.

(Oellers-Frahm, 2012 , p. 1042).

Another problem present in the high discretion of the plausibility requirement lies in the absence of an application standard (Lee-Iwamoto, 2012, pp. 241-247). However, a Plausibility test is required for a case to be considered for its verification.¹⁸ For example, in ICJ *Pulp Mills* case, Judge Abraham expressed that the Court could not prescribe provisional measures without a minimum degree of proof by the applicant in its submissions.¹⁹ Nevertheless, it was only in the case concerning the *Questions Relating to the Obligation to Prosecute or Extradite* that the Court finally incorporated plausibility as a requisite by stating that: “[T]he power of the Court to indicate provisional measures should be exercised only if the Court is satisfied that the rights asserted by a party are at least plausible.”²⁰ This formula was repeated in other cases, but it was still uncertain what would be the degree of plausibility necessary for fulfilling such a requirement.²¹

The ICJ still does not clarify what the definitive standard would be to measure the necessary degree of evidence in the plausibility test (Marotti, 2014, p. 761). When we observe a high degree of proof, it can be observed that little is advocated in its favor (Kolb, 2020, p. 380), as it could constitute a previous analysis of merit. On the other hand, much is discussed about the low degree of proof. As already highlighted, plausibility seeks to avoid possible frivolous and baseless cases.²² Therefore, a minimum degree of plausibility may be required in the analysis of the requirement, leaving the examination of the merits by the Court in its decision a more rigid degree to be debated (Kolb, 2020, p. 381). Furthermore, according to Kolb (2020, p. 381), it would be illogical to demand a high level of proof since provisional measures require urgency in their analysis to fulfil their objective of guaranteeing the protection of the right in the pending case.

In this sense, highly complex proofs could delay the prescription of measures (Kolb, 2020, p. 381). Likewise, when delving into this standard, ICJ tends to establish a lower degree of proof, as in the case of *Questions Relating to the Obligation to Prosecute or Extradite, Certain Activities carried out by Nicaragua in the Border Area* and the *Request for Interpretation of the Judgment*

18 ICJ. *Certain Criminal Proceedings in France (Republic of the Congo v. France)*, Provisional Measure, Order of 17 June 2003, I.C.J. Reports 2003, p. 25; para. 20.

19 ICJ. *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Separate Opinion of Judge Bennouna, 2006b, p. 145, para. 7-12; ICJ. *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Separate Opinion of Judge Abraham, 2006c, pp. 140-141, paras. 8-9.

20 ICJ. *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Provisional Measures, Order of 28 May 2009, 2009, p. 151, para. 57 (emphasis added).

21 ICJ. *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Order of 8 March 2011, 2011a, pp. 18-20; para. 53-59; ICJ. *Request for Interpretation of the Judgment of 15 June 1962 in the Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand) (Cambodia v. Thailand)*. Judgment of 11 November 2013, 2013, p. 295; para. 33.

22 “Yet, the examination of the plausibility of the alleged rights at the stage of provisional measures may run the risk of dealing with matters which should be examined at the stage of the merits and, consequently, the order of provisional measures may come close to the interim judgment. If this is the case, there is a concern that the plausibility test may make the distinction between provisional measures and pre judgment obscure” (Tanaka, 2021, p. 172).

of 15 June 1962 in the Case Concerning the Temple of Preah Vihear.²³ It is, therefore, notable that the Court adopted a low degree of plausibility proof standard (Lee-Iwamoto; 2012, p. 251). On the other hand, it is worth mentioning that a low degree of proof should not be understood as low quality of proof. In other words, the quality of the evidence should not be lower for reasons of urgency in the prescription of provisional measures to protect the right in the dispute (Thirlway, 2013, p. 937).

Despite a consolidated jurisprudence, the idea of an application standard linked to the plausibility requirement is something that is still in constant development. As we will see in the next section, despite ITLOS decisions being based on the same standard on the requirement, it is observed that the Tribunal followed a somewhat divergent path on the same.

4. Standard of Plausibility Applied by ITLOS

Because ICJ and ITLOS practice are closely related, it was natural for the Tribunal to incorporate the requirement initially developed by the Court. When we look at the history of the development of provisional measures in UNCLOS, it is clear that the Convention, in essence, incorporated article 41 of ICJ statute (Boyle and Chinkin, 2007, p. 376).

In ITLOS, plausibility needed a longer time to be finally considered an explicit requirement, albeit already implicit in some cases. This occurred because the jurisdiction of the Tribunals constituted based on UNCLOS is restricted only to disputes about the application and interpretation of the Convention, not being necessary to analyze the law beyond the Convention (Miles, 2016, p. 194).²⁴ Such fact could make it difficult to incorporate the requirement, as demonstrated in the case *Questions relating to the Seizure and Detention of Certain Documents and Data* which ICJ determined that, under Article 288 of UNCLOS, if the rights were present in the analysis of jurisdiction then the rights claimed by the parties would be evident (Miles, 2016, p. 201).²⁵

23 ICJ. *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Provisional Measures, Order of 28 May 2009, 2009, p. 37; para. 60; ICJ. *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Order of 8 March 2011, 2011a, para. 40.

24 “Art. 288(1): A court or Tribunal referred to in article 287 shall have jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part. UNCLOS.

25 ICJ. *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia)*, Order of 3 March 2014, 2012, pp. 152-153; para. 25-28; ITLOS. *M/V “SAIGA”(No. 2) (Saint Vincent and the Grenadines v. Guinea)*, Provisional Measures, Order of 11 March 1998, 1998, p. 20; para. 30; ITLOS. *M/V Louisa Case (Saint Vicent Grenadines v. Spain)*, Provisional Measures, Order of 23 December 2010, 2010, p. 67, para. 53; ITLOS. *ARA Libertad (Argentina v Ghana)*, Provisional Measures, Order of 15 December 2012, 2012, p. 345; para. 69; ITLOS. *The Arctic Sunrise Case (Netherlands v.*

Even if more restricted, ITLOS adopted the plausibility requirement as one of paramount importance in its prescription of provisional measures, but it took some time to evolve. In the *M/V Louisa* case, implicitly referring to the need to demonstrate the existence of certain claimed rights, the Tribunal considered that it was not necessary to “Establish definitively the existence of rights claimed”.²⁶ Even using a different language from that used by ICJ, the Tribunal established the idea that the parties would not need a high degree of proof, that is, a low degree of proof would be required. The Tribunal adopted the same reasoning in the *ARA Libertad* and *Arctic Sunrise* cases.²⁷ In *ARA Libertad*, for example, ITLOS understood that it would only be necessary to demonstrate an existing right without any direct references to the requirement.²⁸

The requirement only appeared explicitly in the *Dispute Concerning Delimitation of Maritime Boundary between Ghana and Côte d'Ivoire*. Citing the *Questions relating to the Seizure and Detention of Certain Documents and Data* case, in stating that the Special Chamber would need to understand that the right alleged by Côte d'Ivoire on the merits should be at least plausible, under the terms of Article 290(1), the Tribunal considered that: “(...) the Special Chamber need not therefore concern itself with the competing claims of the Parties, and that it need only satisfy itself that the rights which Côte d'Ivoire claims on the merits and seeks to protect are at least plausible.”²⁹

From that case on, ITLOS started to consider the requirement expressly, as in the *Enrica Lexie* case, which considered the need to demonstrate whether the alleged right in the case would be plausible or not by the parties.³⁰ Referring to the *Dispute Concerning Delimitation of Maritime Boundary between Ghana and Côte d'Ivoire* case, the Tribunal considered that both parties demonstrated that the alleged rights would be plausible and that it need not be concerned with claims to the parties' competing claims, but only make sure that: the rights which Italy and India claim and seek to protect are at least plausible and that it needs only to satisfy

Russia), Provisional Measures, Order of 22 November 2013, 2013, p. 249; para. 89; ITLOS. *ARA Libertad (Argentina v Ghana)*, Provisional Measures, Order of 15 December 2012, 2012, p. 243; para. 54.

26 ITLOS. *M/V Louisa Case (Saint Vincent Grenadines v. Spain)*, Provisional Measures, Order of 23 December 2010, 2010, p. 67, para. 53.

27 ITLOS. *ARA Libertad (Argentina v Ghana)*, Provisional Measures, Order of 15 December 2012, 2012, p. 243; para. 54; ITLOS. *The Arctic Sunrise Case (Netherlands v. Russia)*, Provisional Measures, Order of 22 November 2013, 2013, p. 249; para. 89.

28 “Considering that at this stage of the proceedings, the Tribunal does not need to establish definitively the existence of the rights claimed by Argentina and yet, before prescribing provisional measures, the Tribunal must satisfy itself that the provisions invoked by the applicant appear prima facie to afford a basis on which the jurisdiction of the Annex VII arbitral tribunal might be founded.” ITLOS. *ARA Libertad (Argentina v Ghana)*, Provisional Measures, Order of 15 December 2012, 2012, p. 343; para. 60.

29 ITLOS. *Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana v Côte d'Ivoire)*, Provisional Measures, Order 25 April 2015, 2015c, p. 158; para. 58; ICJ. *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia)*, request for indication of provisional measures, Order of 3 March 2014, 2014, p. 153; para. 27; Lando, *Supra* Note 8, at 643.

30 ITLOS. *The Enrica Lexie Incident (Italy v. India)*, Provisional Measures, Order of 24 August 2015, 2015b, p. 197; para. 84.

itself that the rights which Italy and India claim and seek to protect are at least plausible.³¹

On its last provisional measures case until now, the Tribunal when prescribed its order on *San Padre Pio* did a deeper analysis about the plausibility of the alleged rights by Switzerland.³² Beside, considered plausible the statements that seeks to protect are rights to the freedom of navigation and other internationally lawful uses of the sea related to this freedom in the exclusive economic zone under article 58 of the Convention,³³ ITLOS was not unanimous about the claims. Switzerland claimed that Nigeria's obligation to have due regard to rights and duties of Switzerland in the EEZ includes "its right to seek redress on behalf of crew members and all persons involved in the operation of the vessel, irrespective of their nationality."³⁴ However, the Tribunal understood unnecessary to make a determination of the plausible character of its claimed rights since the legal and factual issues were not fully addressed by the parties in the proceedings.³⁵ Therefore, the plausibility requirement can be considered essential when prescribing provisional measures in ITLOS.³⁶

When looking at the plausibility standard in ITLOS, as in ICJ, the Tribunal did not determine a precise application standard for the plausibility. The application of plausibility can raise several questions, especially when the argument involves a requirement imported from another dispute settlement system. In this sense, it is worth highlighting the differences between the plausibility requirement applied by ITLOS and ICJ and the possible solutions given by each system (Marotti, 2021, p. 134).

Plausibility is divided into two classifications: rights and claims. The plausibility of rights is the verification of whether the rights claimed by the applicant are based on International Law, that is, the plausibility of the rights. While the plausibility of claims verifies whether the defendant's conduct violates the plausibly claimed rights, that is, it is the plausibility of the claims. In the ICJ for the plausibility check, a two-step test needs to be fulfilled, helping both the work of the courts and tribunals and the way the parties proceed (Lando, 2018, p. 667; Lee-Iwamoto, 2012, pp. 247-251).³⁷

31 *Ibid.*, p. 197; para. 83-85.

32 ITLOS. *The M/T San Padre Pio Case (Switzerland v. Nigeria)*, Request for the prescription of Provisional Measures, Order of 6 July 2019, 2019b, pp. 393-400; para. 77-110.

33 *Ibid.*, p. 399; para. 106-108.

34 *Ibid.*, p. 400; para. 109.

35 *Ibid.*, p. 400; para. 109.

36 "As with the link test, provisional measures for the protection of the marine environment are also exempt from the plausibility requirement. The test assesses the existence of rights which are contested on the merits. As the right to seek provisional measures arises not from the merits themselves, but from an express grant of power under the terms of UNCLOS Article 290, the particular hoop need not be jumped through by the applicant. In such situations, the true test is whether the serious environmental harm hypothesized will actually come about – a question that arises in relation to the requirements of irreparable harm and urgency" (Miles, 2016, p. 203).

37 Elucidating the issue, the ICJ highlighted in the *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All*

When we look at ITLOS, we see a different approach to how the Tribunal applies plausibility. UNCLOS Tribunals have restrictions on the rights to be protected concerning the interpretation and application of the Convention itself. According to Marotti, the assessment of the plausibility of rights in disputes in the context of UNCLOS: “overlaps with the assessment of *prima facie* jurisdiction, which is aimed at establishing whether there exists a dispute on the interpretation and application of the Convention” (Marotti, 2021, p. 134; Miles, 2016, pp. 201-202). In this sense, the Tribunal understood the requirement of the plausibility of rights as an autonomous requirement in granting provisional measures.³⁸

As for the plausibility of claims, ITLOS takes a different approach from ICJ. In examining the plausibility of claims, the Court needs to make a thorough examination of the merits to seek an adequate examination of the evidence. On the other hand, ITLOS is restricted to the interpretation and application of the Convention, leading it to adopt a “light” approach to plausibility. Therefore, the Tribunal should be cautious about rights and claims that must be further investigated at the merits stage.³⁹ In this sense, the Special Chamber in the *Dispute Concerning the Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean* expressed that: “before prescribing provisional measures, the Special Chamber does not need to concern itself with the competing claims of the Parties, and that it need only satisfy itself that the rights which Côte d'Ivoire claims on the merits and seeks to protect are at least plausible” (Miles, 2018, p. 85).⁴⁰

Another issue faced by ITLOS and the existence of its forms of provisional

Forms of Racial Discrimination: “In effect, in the present Order, the ICJ uses the term “plausible” not only in respect of rights (...), but also more widely in respect of the application of international instruments (...), thus disclosing two distinct forms of legal “plausibility”. Like-wise, in the present Order, the ICJ uses the term “plausible” also in relation to facts (...), thus referring to another distinct form, this time of factual “plausibility”. The term is used even by reference to “intent” and “purpose” (...). And the ICJ, in the present Order, further uses the term “plausible” also in relation to arguments or allegations (...).” ICJ. *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, Provisional Measures, Separate Opinion of Judge Cañado Trindade, Order of 19 April 2017, 2017, pp. 169-170; para. 38. (emphasis added).

38 The fact that the Special Chamber refers for the first time to plausibility as a separate requirement for the prescription of provisional measures may be linked to the circumstance that, in this case, jurisdiction was based on a special agreement between the parties. ITLOS. *Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana v. Côte d'Ivoire)*, Provisional Measures, Order 25 April 2015, 2015d, p. 315; para. 58.

39 “The Tribunal considers that the question of whether the third right asserted by Switzerland is plausible would have required the examination of legal and factual issues which were not fully addressed by the Parties in the proceedings before it. Having established that the first and second rights asserted by Switzerland are plausible, the Tribunal, therefore, does not find it necessary to make a determination of the plausible character of the third right at this stage of the proceedings.” ITLOS. *The M/T San Padre Pio Case (Switzerland v. Nigeria)*, Request for the prescription of provisional measures, Order of 6 July 2019, 2019b, p. 400; para. 110.

40 ITLOS. *Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana v. Côte d'Ivoire)*, Provisional Measures, Order 25 April 2015, 2015d, p. 315; para. 58.

measures is provided by Article 290(1) and 290(5), which are the measures under the Tribunal itself and in UNCLOS Annex VII Arbitral Tribunal, respectively (Marotti, 2021, p. 135). ITLOS should adjust the plausibility according to the type of measures it should prescribe. This will undoubtedly be reflected in the way the Tribunal should establish its application standard or in a possible need for the existence of more than one standard for each of the forms. In the provisional measures of article 290(1), the Tribunal may have greater discretion regarding the provisional measures and the standard of application of plausibility since the merits will be decided in the same body, with the measures functioning as incidental procedures within a more significant disputed case.⁴¹ As for the measures prescribed under Article 290(5), ITLOS is only authorized to prescribe the provisional measures pending the establishment of the Annex VII Arbitral Tribunal that will decide the dispute. Therefore, the plausibility applied to the measures in paragraph 5 by ITLOS should be less intrusive in merit analysis (Tomka, 2017, p. 184).⁴²

5. Conclusion

The standard of application of plausibility has not yet reached a definitive form. Much remains to be discussed concerning the plausibility, especially in ITLOS, where it is a requirement that has just been explicitly incorporated by the Tribunal's jurisprudence, and it is something that is still in constant development. However, in addition to the difficulty in establishing a standard, ITLOS still needs to consider that it has the two forms of provisional measures in Article 290(1) and 290(5) of UNCLOS, for cases submitted to the Tribunal itself and the measures from the Annex VII Arbitral Tribunals, respectively. This difference leads to a need to adapt the plausibility to each case. While in the measures of paragraph 1 the Tribunal is more open to slightly examine the merits, in the cases of paragraph 5, ITLOS have to be stricter to its limits since the tribunal does not have jurisdiction over the merits of the final decision in the dispute. Therefore, as previously noted, a less rigorous approach to the requirement should be observed in the cases of paragraph 5. This may reflect in the way the Tribunal should establish its application standard or in a possible need for the existence of more than one standard for each of the forms when there is the need to demonstrate whether the alleged right in the case would be plausible or not by the parties. As mentioned above, in the *San Padre Pio* case, the Tribunal understood against the existence of the plausibility since the legal and claimed issues were not fully addressed by the parties in the proceedings. This might be a prevision of what approach ITLOS is

⁴¹ *Ibid.*, p. 134.

⁴² ITLOS. *The M/T San Padre Pio Case (Switzerland v. Nigeria)*, Order of 6 July 2019, Dissenting opinion of Judge Kateka, 2019c, p. 475; para. 3.

going to pursue in its future cases, a more rigorous approach to the requirement to be observed in cases of paragraph 1. However, it is uncertain with what approach the Tribunal is going to prescribe the provisional measures.

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